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U.S. Department of Homeland Security

Citizenship and Immigration Services

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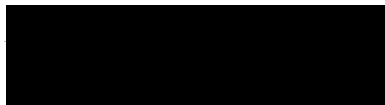
ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 Eye Street N.W.  
Washington, D.C. 20536



File: EAC-01-251-55105 Office: Vermont Service Center

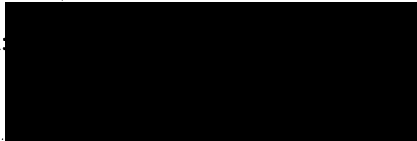
Date: FEB 06 2004

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



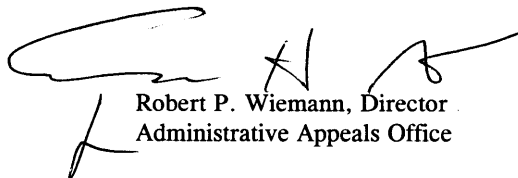
**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations, now the Administrative Appeals Office (AAO). The matter is again before the AAO on motion to reopen. The motion will be approved, the previous decision of the Associate Commissioner for Examinations will be vacated, and the petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The center director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, and again on motion, the petitioner argues that its owner who also cooks at the restaurant has a serious heart condition which will cause him to retire once the beneficiary is hired. The petitioner's contention regarding the owner's health is supported by a letter from his cardiologist. The petitioner also states that hiring the beneficiary would eliminate the need for part-time help. The AAO did not discuss these issues in its previous decision.

The record shows that petitioner's owner has consistently taken an annual salary of \$31,200. The wage offered the beneficiary is \$17.61 an hour which equates to \$36,629 per annum. Both the director and the AAO found that the petitioner was unable to establish that it was able to pay the beneficiary the proffered wage as of the priority date. In his decision, the director indicated that the petitioner had not established the ability to pay the proffered wage at the time of filing and continuing to the present. The director's decision, however, only discusses the petitioner's financial conditions as of the time of filing.

The priority date in this case is August 11, 2000. If the beneficiary had begun work for the petitioner on that date, the petitioner would have been required to pay him approximately \$15,260 for the remainder of 2000. Assuming that the petitioner's owner would have retired at that time, \$13,000 of his annual salary would have been available to pay the beneficiary. The petitioner has given the names and amounts paid to at least two part-time employees during 2000. One who resigned during that year received \$3,250; the other received \$3,900. The amount paid to one of these part-time workers, or a pro-rated amount of the total paid to both coupled with the above \$13,000 from the petitioner's salary would have been enough to pay the beneficiary the proffered wage during

the remainder of 2000.

The AAO has commented in previous decisions that any claim that a beneficiary would replace a current worker should be supported by documentation regarding the position, duties, and termination of the worker. The petitioner has complied with those guidelines.

In review, the AAO has determined that the petitioner has credibly established that it had the ability to pay the beneficiary the proffered wage as of the priority date.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

**ORDER:** The decision of the Associate Commissioner, dated September 19, 2002, is vacated, and the petition is approved.